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Odyssey Capital Group, L.P., III and Phillip D. Demas. Case 6–CA–30010

August 1, 2002

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND COWEN

On February 8, 2000, Administrative Law Judge Jerry M. Hermele issued the attached decision. The Respondent filed exceptions, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and briefs, and has decided to affirm the judge's rulings, findings, and conclusions as modified, and to adopt the recommended Order as modified.¹

I. RELEVANT FACTS

The Respondent owned and managed the Cascades Townhouse Apartments, a 150-unit apartment complex located in Ross Township, Pennsylvania.² Colleen Snyder managed the Respondent's apartment complex.³ As property manager, Snyder was responsible for the daily operations of the complex, including the supervision of the Respondent's three maintenance employees: Robert Holtz Jr., Phillip D. Demas, and Randy Creason. As maintenance employees, Holtz, Demas, and Creason were responsible for preparing vacant units for occupancy, making minor repairs to household equipment, and maintaining the common grounds. Additionally, they also scraped and repainted water-damaged ceilings in certain one-bedroom apartments.

In April 1998,⁴ Demas was assigned to scrape and paint a certain section of the ceiling in Apartment 35. That evening he watched a television program concern-

ing the health risks associated with exposure to asbestos. The program contained a discussion of the risks associated with materials similar to the water-damaged ceiling material he had scraped earlier that day, and Demas became concerned that he and his coworkers were being exposed to airborne asbestos. The next morning, he told Holtz and Creason about the program, and they agreed to ask Snyder immediately if the material at issue presented an asbestos-related health risk. She informed them that there was no asbestos in the apartment complex.

On April 23, Holtz and Demas arranged to have a sample of material from the ceiling of Apartment 35 tested at an independent laboratory. The testing indicated that the material was about five percent asbestos. Holtz, Demas, and Creason took the test results to Snyder, who questioned their accuracy. Demas told Snyder that the three employees would not perform work on the ceilings of the one-bedroom apartments until another test was performed indicating that it would be safe. Snyder forwarded the test results to John Kirwin, the Respondent's president, who replied that tests performed in 1991 and 1995 revealed that there was no asbestos. On that basis, Snyder rejected the employees' request for a second test.

The employees received a work order requiring them to enter Apartment 35 to change a light bulb during the first week of May. After discussing the matter, all three employees refused to perform the work based on their concerns about possible exposure to airborne asbestos in the apartment. On May 15, Snyder discharged the three employees for insubordination and because, as their termination letters stated, they "fail[ed] to perform work duties which [they] were directed to perform by [their] supervisor."⁵

⁵ After the employees were discharged, they contacted local media and county and federal regulatory agencies. As a result, three additional tests were conducted by a local television station, the Allegheny County Health Department, and the Occupational Safety and Health Administration (OSHA). All three tests indicated that the ceiling material contained asbestos. In addition, as a result of OSHA's investigation, an action was instituted against the Respondent for violating the Occupational Safety and Health Act (29 U.S.C. §§ 651–678). On November 29, 1999, administrative law judge Michael H. Schoenfeld of the Occupational Safety and Health Review Commission found that the Respondent's reliance on the 1991 and 1995 reports was not reasonable, and that it should have known that its paint-scraping would release materials containing asbestos. Accordingly, the judge ruled, the Respondent was presumed to have exposed employees to asbestos in amounts exceeding acceptable limits. The judge assessed a penalty of \$10,500. *Secretary of Labor v. Cascade Apartments*, 1999 WL 1278190 (O.S.H.R.C.) (1999), aff'd. 2000 WL 1728274 (O.S.H.R.C.) (Nov. 21, 2000). At the hearing, the Respondent objected to testimony regarding the post-termination asbestos testing. The judge overruled the objection. In addition, after the close of the hearing the judge re-

¹ We shall modify the judge's recommended Order in accordance with our decision in *Ferguson Electric Co.*, 335 NLRB No. 15 (2001). We shall substitute a new notice in accordance with our recent decision in *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (2001).

² Although the record reflects that the Respondent ceased managing the property in 1998, the record is unclear whether the Respondent is still in business or whether the apartment complex is still open. Because the record is not clear on this point, we shall leave to compliance the resolution of this issue and its effect on the Order.

³ Snyder resigned on or about September 9, 1998.

⁴ All dates are in 1998, unless stated otherwise.

II. ANALYSIS

We agree with the judge, for the reasons that follow, that the employees' refusal to perform work in Apartment 35 constituted protected concerted activity, and that the Respondent violated Section 8(a)(1) by discharging them. It is well established that employees who concertedly refuse to work in protest over wages, hours, or other working conditions, including unsafe or unhealthy working conditions, are engaged in "concerted activities" for "mutual aid or protection" within the meaning of Section 7 of the Act. *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962). The evidence demonstrates, and the Respondent concedes, that Demas, Holtz, and Creason refused to enter Apartment 35 and change the light bulb because of their respective and collective concern about exposure to airborne asbestos in the unit, and that it discharged them solely because of their collective refusal to perform the work.

In its exceptions the Respondent renews its argument that the complaint should be dismissed because the employees lacked a reasonable, objective basis for their belief that work in the apartment could expose them to an unhealthy level of airborne asbestos, and that their refusal to work was unprotected on that basis. In this regard, the Respondent asserts that the appropriate standard for determining whether the employees' protest was protected by the Act is found in *Gateway Coal Co. v. United Mine Workers of America*, 414 U.S. 368, 387 (1974), a case involving Section 502 of the Labor Management Relations Act, 29 U.S.C. § 143.⁶ We find no merit in the Respondent's arguments.

ceived Judge Schoenfeld's decision into the record over the Respondent's objection. No exceptions have been filed to these rulings.

These after-the fact findings are not necessary to our resolution of this case or material as to whether the employees' conduct was protected under *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962), as discussed below. The evidence, however, certainly "shows that the conduct of these workers was far from unjustified under the circumstances." *Id.* at 16.

⁶ In *Gateway Coal*, the union sought to justify the employees' work stoppage, which was prohibited by their collective-bargaining agreement, by contending that it was called because of "abnormally dangerous conditions of work" and that employees were therefore protected by Sec. 502 of the Act, which provides in relevant part: "nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this chapter." The Supreme Court interpreted Sec. 502 of the Labor Management Relations Act as authorizing a work stoppage "called solely to protect employees from immediate danger" when the union is under an obligation to refrain from striking. *Id.* at 385. In so holding, the Court rejected the view that "an honest belief, no matter how unjustified, in the existence of 'abnormally dangerous conditions for work' necessarily invokes the protection of Section 502. . . . [A] union seeking to justify a contractually prohibited work stoppage under Section 502 must present 'ascertainable, objective evidence supporting its conclusion that an

As the judge noted, the allegations here arise under Section 8(a)(1), not Section 502. Thus, the appropriate standard for allegations that the Respondent's discharge of employees because of their protest of unacceptable working conditions violated Section 8(a)(1) was articulated by the Supreme Court in *Washington Aluminum*, supra. As the Court held there, an employer's retaliatory or discriminatory action against employees for engaging in concerted activities protected by Section 7 of the Act violates Section 8(a)(1) of the Act. 370 U.S. at 17. The Court also said that employees' concerted activity will not be protected by the Act if it is unlawful, violent, in breach of contract, or otherwise indefensible. *Id.*⁷ There are no allegations here that the employees' conduct lost the Act's protection for any of these reasons. Thus, under applicable legal principles, we find that the Respondent's discharge of the employees violated Section 8(a)(1) of the Act.⁸

The *Washington Aluminum* Court further stated that "it has long been settled that the reasonableness of workers' decisions to engage in concerted activity is irrelevant to the determination of whether a labor dispute exists or not." *Id.* at 16.⁹ We therefore disavow the judge's discussion of whether the employees' concerns about exposure to airborne asbestos lacked a reasonable, objective basis. As a matter of law, the Board and courts have not interpreted *Washington Aluminum* as imposing such a burden. In *Tamara Foods*, supra, the Board stated that "Inquiry into the objective reasonableness of employees' concerted activity is neither necessary nor proper in determining whether that activity is protected." 258 NLRB at 1308. "Whether the protested working condition was actually as objectionable as the employees believed it to be . . . is irrelevant to whether their concerted activity is protected by the Act." *Id.*

Moreover, even assuming arguendo that a "reasonable, objective basis" inquiry were relevant, we would find, as a factual matter, that the employees' protest had such a basis.¹⁰ The employees became aware that they could be

abnormally dangerous condition for work exists." *Id.* at 385-387 (citations and footnotes omitted).

⁷ See also *Tamara Foods, Inc.*, 258 NLRB 1307, 1308 (1981), enf'd, 692 F.2d 1171 (8th Cir. 1982), cert. denied 461 U.S. 928 (1983).

⁸ The Respondent has not asserted that the employees engaged in an unprotected partial strike. It argues only that the employees' conduct was unprotected because they lacked an objective, reasonable basis for their refusal to work.

⁹ The Court found that, in any event, "the conduct of these workers was far from unjustified under the circumstances." *Id.*

¹⁰ While we have found that the employees here *did* have an objective, reasonable basis for their refusal to work, the finding is not necessary to our resolution of this case. Member Cowen argues that the reasonableness of a claimed belief that an unsafe working condition exists is material to the determination of whether the employees "in fact

exposed to airborne asbestos through a television news program, which referred to materials that appeared identical to those with which they worked. Based on the contents of the program, they attempted to find out from the Respondent whether asbestos constituted a threat to them. The Respondent's handling of their inquiry led them to have an independent laboratory test the suspect material, and the test confirmed the presence of asbestos. Thus, they found reason to doubt the Respondent's denial that there was asbestos in the apartments. They also knew that, in the recent past, paint had been scraped from water-damaged material in that apartment without precautions to reduce the risk of exposure. Thus, at the time they were directed to go into Apartment 35, they certainly had an objective basis for concern that airborne asbestos was present there.

In any event, as the Respondent has conceded that they were discharged for their refusal to go into Apartment 35 because of their asbestos concern, we find that the Respondent violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Odyssey Capital Group, L.P., III, Ross Township, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

were motivated by such alleged conditions in taking the actions at issue in a particular case." We need not decide that question in this case, because the motives of the employees are not at issue. The Respondent has acknowledged that the "[e]mployees refused to enter [the] apartment . . . because of their respective and collective concern about exposure to airborne asbestos fibers in the unit." Respondent's Exceptions at p. 3. The Respondent contends that there was no objective, reasonable basis for this belief. Neither Member Cowen nor we agree with that contention.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 1, 2002

Peter J. Hurtgen, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER COWEN, concurring.

I agree with my colleagues that the employees in this matter were engaged in protected concerted activity when they refused to perform work based upon an "honest and reasonable belief" that the work presented a safety hazard. *J. T. Cullen Co.*, 271 NLRB 114, 115 fn. 4 (1984) *enfd.* 767 F.2d 924 (7th Cir. 1985).¹ I write separately simply to state my view that the Board should examine the reasonableness of a claimed belief that an unsafe working condition exists in determining whether the employees in fact were motivated by such alleged conditions in taking the actions at issue in a particular case.

In *NLRB v. Washington Aluminum*, 370 U.S. 9 (1962), the Supreme Court ruled that the reasonableness of the employees' response to undesirable working conditions was not relevant in determining the protected nature of that activity. The Court did not address itself to the question of whether the employees in fact were motivated by the alleged undesirable working conditions. In my view, if the employees' stated belief that certain working conditions are unsafe is objectively reasonable, that is evidence to support a finding the employees in fact were motivated by that belief. On the other hand, evidence that the employees' stated belief is not reasonable is evidence that could support a finding that the belief was not, in fact, held, or that it did not, in fact, motivate the employees' activity.

Simply stated, if the employees' stated belief that working conditions are unsafe is not honestly held, activity purportedly based on the claimed unsafe conditions is not thereby protected. Similarly, if the employees' actions are not actually motivated by the alleged unsafe working conditions, those conditions do not provide a basis for finding the employees' actions to be protected.

¹ Under these circumstances, I find it unnecessary to rely on *Tamara Foods*, 258 NLRB 1307 (1981), *enfd.* 692 F.2d 1171 (8th Cir. 1982), *cert. denied* 461 U.S. 928 (1983), and I do not pass on the validity of the Board's rationale in that case.

As a final matter, even where the employees' stated belief that working conditions are unsafe is honestly held, if the evidence shows that that belief is not objectively reasonable, I would not be inclined to find activity based upon that belief to be protected. By way of example, if the employees in this case had refused to perform work in apartment number thirteen based solely upon the superstitious belief that the number thirteen is unlucky, I would not find that refusal to be protected.

Dated, Washington, D.C. August 1, 2002

William B. Cowen, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT terminate or discipline any employees for refusing to perform work because of their concerns about health or safety.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Holtz Jr., Phillip D. Demas, and Randy Creason full reinstatement to their former jobs or, if those former jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Holtz Jr., Phillip D. Demas, and Randy Creason whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful discharges and within 3 days thereafter notify Robert Holtz Jr., Phillip D. Demas, and Randy Creason in writing that this has been done and that the discharges will not be used against them in any way.

ODYSSEY CAPITAL GROUP, L.P. III

Patricia J. Daum, Esq., Pittsburgh, Pennsylvania, for the General Counsel.

Daniel J. Sporrer, Esq. (Salamon & Sporrer), Pittsburgh, Pennsylvania, for the Respondent.

DECISION¹

I. STATEMENT OF THE CASE

JERRY M. HERMELE, Administrative Law Judge. This case concerns the termination of three employees in May 1998 for failing to perform work because of their concerns about on-the-job safety. On September 16, 1999, the General Counsel issued a complaint alleging that the Respondent, Odyssey Capital Group, L.P. III (Odyssey), violated Section 8(a)(1) of the National Labor Relations Act by terminating three nonunionized maintenance men when they concertedly complained about asbestos exposure and refused to work in an apartment they believed contained airborne asbestos. In an October 1, 1999 answer, the Respondent maintained that the employees had no reasonable basis to believe that a health risk existed.

A trial was held on November 16, 1999, in Pittsburgh, Pennsylvania, during which the General Counsel and the Respondent each presented two witnesses. Then, on December 20, 1999, both parties filed written briefs.²

II. FINDINGS OF FACT

The Respondent is a limited partnership which owned the Cascades Townhouse Apartments north of Pittsburgh; a 150-unit complex managed by Colleen Snyder (G.C. Ex. 1(e); Tr. 13, 86, 88). John Kirwin is the Respondent's President (Tr. 89). The apartment complex's gross revenues exceeded \$500,000 a year, and 10 over \$5000 a year in interstate goods were purchased and received there (G.C. Ex. 1(e), 1(g); Tr. 6).

¹ Upon any publication of this decision by the National Labor Relations Board, changes may have been made by the Board's Executive Secretary to the original decision of the Presiding Judge.

² On January 14, 2000, the General Counsel filed a motion to reopen the record to receive the November 29, 1999 decision of U.S. Administrative Law Judge Michael H. Schoenfeld in *Secretary of Labor v. Odyssey Capital Group III, L. P.*, OSHRC Docket No. 98-1745 (G.C. Ex. 9). Therein, Judge Schoenfeld found that the Respondent violated the Occupational Safety and Health Act of 1970, 29 U.S.C. Section 5(a)(2), because their 1991 and 1995 asbestos tests were deficient, thus making the Respondent's reliance on those tests unreasonable. On January 18, however, the Respondent opposed the motion, claiming that Judge Schoenfeld's decision was irrelevant to the issues in this case. Then, on January 25, the General Counsel submitted a certified copy of the decision. For background purposes only, it is concluded that the decision is relevant. Thus, the 16-page exhibit will be received.

The complex was maintained by a three-man, nonunion crew: Robert Holtz, Jr., Phillip Demas, and Randy Creason (Tr. 13–15). In the spring of 1998, Demas watched a television program about asbestos-laden paint which he believed may have been present in the ceilings of 36 one-bedroom apartments. Demas had previously scraped the paint off the ceilings of certain water-damaged apartments, including Apartment 35. When performing this work, Demas wore no special clothing or a mask. The next day, Demas talked with Holtz and Creason about the program, whereupon Demas and Holtz visited with Snyder to inquire whether the paint posed a health problem. Snyder, however, told them that there was “no asbestos” at the Cascades. But Demas and Holtz did not believe Snyder. So, on April 23, 1998, Demas took a sample of paint from the ceiling of Apartment 35, where he had worked earlier, and Holtz brought it to PSI, a Pittsburgh laboratory, for asbestos testing. One day later, PSI found the sample to contain 5% asbestos. Demas and Holtz then presented the test result to Snyder but she questioned the accuracy of it and rejected the possibility of a second test. And Snyder discussed the matter with Kirwin, who said there was no asbestos problem based on tests performed in 1991 and 1995. But Holtz told Snyder that the men were no longer going to scrape ceilings with the questionable paint (G.C. Ex. 2; Tr. 15–18, 21–22, 30–32, 43–45, 49, 57, 89–91, 128–29).

For about 2 or 3 weeks, no work needed to be done in any of the 36 apartments with the asbestos paint (Tr. 51–52, 96). Then, in mid-May, a lightbulb needed to be changed in Apartment 35. Snyder gave the work order to Holtz and all three men discussed the matter among themselves. Holtz refused to go into the apartment because of airborne asbestos. Likewise, Demas and Creason refused. So, Snyder fired all three on May 15 after consulting with Kirwin (G.C. Exs. 3, 4; Tr. 24–26, 52–54, 72–73, 92–95, 129). None of the three men had any specific information about airborne asbestos in the apartment. Moreover, Snyder would not allow any such testing therein. But Demas and Holtz believed that even minimal airborne exposure was dangerous (Tr. 36, 38, 53). Afterwards, in July 1998, Snyder commissioned another laboratory to perform another test on Apartment 90, which indicated no airborne asbestos problem therein (R. Ex. 1; Tr. 100–02, 116–17, 123).

III. ANALYSIS

It is well-settled that unrepresented employees may concertedly decline to perform certain work they deem unsafe without being punished or discharged. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). And although represented employees with a collective-bargaining agreement containing a no-strike clause must have “ascertainable, objective evidence supporting [their] conclusion that an abnormally dangerous condition for work exists,” *Gateway Coal Co. v. Mine Workers*, 414 U.S. 368, 387 (1974), the Board has never applied an objective reasonableness test in the nonunionized workplace. *TNS, Inc.*, 329 NLRB 602 (1999); *Palco*, 325 NLRB 305 (1998), reversed on other grounds *NLRB v. Portland Airport Limousine Co.*, 163 F.3d 662 (1st Cir. 1998).

On the facts of this case, the Presiding Judge concludes that the employees’ protest about airborne asbestos was concerted

and conducted in good faith, albeit lacking a reasonable, objective basis. Indeed, the employees had absolutely no scientific proof of airborne asbestos in Apartment 35 and, moreover, a tenant was living in Apartment 35 at the time the employees refused to enter it for a few minutes to change a light bulb. However, under Board precedent it is clear that these unrepresented employees’ concerted protest over safety was legally protected. *Tamara Foods, Inc.*, 258 NLRB 1307 (1981).³ Accordingly, the Respondent will be required to offer the three employees reinstatement to their former jobs, make them whole for any loss of pay, remove any adverse references in their personnel files, and to post remedial notices.⁴

IV. CONCLUSIONS OF LAW

1. The Respondent, Odyssey Capital Group, L.P. III, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by discharging employees Phillip Demas, Robert C. Holtz, Jr., and Randy Creason on May 15, 1998.

3. The unfair labor practice of the Respondent described in paragraph 2, above, affects commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Accordingly, it is ordered⁵ that the Respondent, Odyssey Capital Group, L. P. III, its officers, agents, successors, and assigns, shall

21. Cease and desist from

(a) Terminating or disciplining any other employees for refusing to perform work because of their concerted concerns about on-the-job health or safety.

(b) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Do the following:

(a) Offer Robert Holtz, Jr., Phillip Demas and Randy Creason full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Robert Holtz, Jr., Phillip Demas and Randy Creason whole for any loss of pay and benefits they may have suffered by reason of their unlawful termination, to be computed 5as set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

³ But see *Wheeling-Pittsburgh Steel v. NLRB*, 618 F.2d 1009 fn. 15 (3d Cir. 1980), cert. denied 449 U.S. 1078 (1981).

⁴ The record is unclear as to whether the Respondent is still in business or whether the apartment complex is open.

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all pay-roll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this order.

(d) Remove from its files any reference to the unlawful discharges, and within three days thereafter notify Robert Holtz, Jr., Phillip Demas and Randy Creason in writing that it has done so and that it will not use the discharges against them, in any way.

(e) Within 14 days after service by the Region, post at its facilities in Ross Township, Pennsylvania and all other places where notices customarily are posted copies of the attached notice marked "Appendix."⁶⁶ Copies of the notice, on forms provided by the Regional Director for Region 6, after 30 being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the 35 notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall 40 duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 15, 1998.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the General Counsel's unopposed December 20, 1999 motion to correct the transcript is granted.

⁶⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that the General Counsel's January 13, 2000 motion to reopen the record and receive General Counsel Exhibit 9 IS GRANTED.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT terminate or discipline any employees for refusing to perform work because of their concerns about health or safety.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce you in exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Robert Holtz, Jr., Phillip Demas and Randy Creason full reinstatement to their former jobs or, if those former jobs no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Robert Holtz, Jr., Phillip Demas and Randy Creason whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest.

WE WILL remove from our files any reference to the unlawful discharges and within 3 days thereafter notify Robert Holtz, Jr., Phillip Demas and Randy Creason in writing that this has been done and that the discharges will not be used against them in any way.

ODYSSEY CAPITAL GROUP, L.P. III